05-7053 ORIGINAL

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KESHIA CHERIE ASHFORD DIXON
Petitioner

vs.

THE UNITED STATES OF AMERICA
Respondent

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Petitioner asks leave to file the attached petition for a writ of *certiorari* without prepayment of costs and to proceed *in forma pauperis*.

Petitioner has previously been granted leave to proceed *in forma pauperis* in the following courts:

United States District Court for the Northern District of Texas; and

United States Court of Appeals for the Fifth Circuit.

The undersigned counsel for Petitioner was appointed to represent Petitioner in the District Court pursuant to 18 USC § 3006A, and subsequently in the Court of Appeals.

WHEREFORE, Petitioner prays that she be granted leave to proceed *in forma pauperis* in this case.

Respectfully Submitted,

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Keshia Cherie Ashford Dixon

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QUESTIONS PRESENTED

QUESTION PRESENTED NO. 1

WHERE A CRIMINAL DEFENDANT RAISES A DURESS DEFENSE, WHETHER THE BURDEN OF PERSUASION SHOULD BE ON THE GOVERNMENT TO PROVE BEYOND A REASONABLE DOUBT THE DEFENDANT WAS NOT UNDER DURESS, OR UPON THE DEFENDANT TO PROVE DURESS BY A PREPONDERANCE OF THE EVIDENCE.

QUESTION PRESENTED NO. 2

WHETHER PETITIONER WAS DEPRIVED OF A FAIR TRIAL BY THE EXCLUSION OF EXPERT TESTIMONY ON BATTERING AND ITS EFFECTS THAT WAS OFFERED IN SUPPORT OF HER DEFENSE OF DURESS.

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STATEMENT OF JURISDICTION

The judgment sought to be reviewed is of a panel of the United States Court of Appeals for the Fifth Circuit that was entered on June 20, 2005, in *United States vs. Dixon*, 413 F.3d 520, 67 Fed. R. Evid. Serv. 630 (5th Cir. 2005).

Panel rehearing and rehearing *en banc* were denied on July 20, 2005.

Jurisdiction is conferred on the Supreme Court to review judgments of a court of appeals on a writ of *certiorari* by 28 USC § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

5th Amendment, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

6th Amendment, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Rule 402, Fed. R. Evid.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 702, Fed. R. Evid.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 52(a), Fed. R. Crim. Pro.

Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

STATEMENT OF THE CASE

On March 5, 2003, a federal grand jury in the Dallas Division of the Northern District of Texas returned a nine count indictment against the Petitioner. Count One alleged that the Petitioner acquired seven firearms while she was under indictment, in violation of 18 USC § 922(n). Counts Two through Nine alleged that the Petitioner made false statements relating to the purchase of the seven firearms and the attempted purchase of another firearm in violation of 18 USC § 922(a)(6) and § 924(a)(2). The indictment was filed in a United States District Court for the Northern District of Texas, Dallas Division, the Honorable Jorge Solis presiding. The United States District Court had jurisdiction over the case pursuant to 18 USC § 3231 because the indictment alleged offenses against the law of the United States.

The Petitioner pled not guilty to the indictment and a jury was impaneled on November 17, 2003. The government presented testimony from agents of the Department of Alcohol, Tobacco and Firearms relating to its investigation; expert testimony on handwriting; and factual testimony from several firearms dealers from whom the firearms were acquired. In its case in chief the government proved that on January 4, and January 11, 2003, that the Petitioner, while at two gun shows, in the company of others, made false statements in order to purchase several firearms and purchased those firearms while she was under indictment.

After the government rested, the Petitioner called as a witness her 16 year old daughter, VeQuisha Ashford, and her 14 year old daughter, Joycelyn Dixon. Each girl testified to a pattern of physical and emotional abuse that the Petitioner had endured from her prior husband, Ted Dixon, and from Petitioner's boyfriend, Thomas Earl Wright, Jr. The girls testified to incidents of violence and threats of violence by Wright and his friend Cory Sanders immediately before each of the two

gun shows. Each girl testified that the violence against their mother had taken place over several months and that it appeared to escalate prior to the purchase of the firearms.

The Petitioner then took the witness stand and testified to a more detailed account of emotional and physical abuse that she suffered at the hands of Ted Dixon for several years, and subsequently from Wright and Sanders in the weeks leading up the gun shows. Petitioner testified that just prior to the purchase of the firearms the violence against her escalated to include Wright striking her in the face, pointing guns at her, threatening to kill her, and threats against her daughters. Petitioner testified that she was forced to go to both gun shows with Wright, and Sanders, or other associates of Wright. Petitioner testified that she was accompanied by Wright and/or one of his associates the entire time she was at the gun shows and that she was acting at all times pursuant to his threats and instructions. At each location in the gun shows where firearms were purchased or attempted to be purchased, a gun dealer testified that young black males were present with Petitioner when the firearms were purchased, but denied that Petitioner was a straw purchaser for anyone. Petitioner admitted that she purchased the seven firearms and attempted to purchase another. Petitioner testified that she purchased the firearms because she was afraid that if she did not, Wright would kill her or cause her serious bodily injury and/or would kill or harm her children. Petitioner testified that she did not like firearms, had not been around firearms until she associated with Wright and would not have purchased the firearms but for the threats from Wright.

After Petitioner testified, the defense sought to call as a witness, Dr. Toby Myers, an expert in the field domestic violence. Dr. Myers had evaluated Petitioner and her family, examined Petitioner's relationship with Ted Dixon and Wright; reviewed background information on Ted Dixon, Wright and Sanders; and observed the testimony of Joycelyn Dixon and Petitioner. The

government objected to Dr. Myers' testimony as not being relevant to any issue in the case and in particular, that the testimony was subjective in nature and therefore not admissible on the issue of duress, citing *United States vs. Willis*, 38 F.3d 170 (5th Cir. 1994). Neither Dr. Myers' data, her methodology, nor her expertise were challenged. The trial judge sustained the government's objection, relying on *United States vs. Willis, supra* and did not allow Dr. Myers to testify before the jury. The defense then rested and both parties closed. Dr. Myers' testimony was then presented to the Court, outside the presence of the jury, pursuant to a bill of exceptions.

Dr. Myers testified that domestic violence is a pattern of coercive control by one party, generally a male, over another party, generally a female, where there are tactics of power and control used along with violence and sexual abuse. She testified that the eight factors that make up a power and control relationship are: intimidation, emotional abuse, isolation, minimizing, denying and blaming, using children for advantage, male privilege, and the coercion and threats. Dr. Myers testified that battering causes physical harm to the victim, damages the victim's self-esteem, causes emotional and psychological harm, causes the victim to become isolated, withdrawn or dependent, causes the victim to become subservient to the batterer, causes the victim to change her behavior so as not to anger the abuser, can cause the victim to engage in criminal behavior, can affect perceptions of the victim, the judgment of the victim and the behavior of the victim. Dr. Myers testified that a woman stays in a battering relationship for financial reasons, due to fear and terror, because she does not have a plan about how she is going to succeed without the batterer and often wants the violence to stop but the relationship to continue. Dr. Myers testified that it is common for the victim in a battering relationship to not seek help from the police, authorities or other persons because of the shame, economic considerations and danger. Dr. Myers testified that a common strategy to avoid

being battered is compliance with the wishes of the batterer. She testified that Petitioner was a battered woman, who was the victim of domestic violence by Ted Dixon and Wright. Dr. Myers testified that the relationship that Petitioner had with Ted Dixon was a power and control relationship that continued even after her divorce from Dixon, and that the Petitioner had a power and control relationship with Wright. In each of those relationships Petitioner was the subservient party.

Dr. Myers went on to analyze Petitioner's relationship with Wright and the events of that relationship, particularly leading up to the purchase of the firearms. Dr. Myers testified that the increase in the severity of the violence, the introduction of guns into the relationship and Wright's threats to the Petitioner's children escalated the power and control that Wright exercised over Petitioner and thus adversely affected Petitioner's ability to make a decision about whether to buy the firearms. Dr. Myers testified that Petitioner's fear of Wright, to which she had testified earlier, was well-grounded due to her experiences with him. Dr. Myers testified that it was consistent with a power and control relationship for the batterer to have little or no regard for the well-being of the victim and therefore put the victim at risk by requiring her to do something illegal. Dr. Myers testified that in her opinion Petitioner did not recklessly or negligently place herself in a situation where she would be forced to choose illegal contact, but that her conduct was a reflection of her fear of Wright. Dr. Myers went on to testify that Petitioner did not call the police because she did not think it would do any good; did not talk to her family because she was embarrassed and did not want to involve them; and that she purchased the firearms in order to buy time to stay alive one more day. Dr. Myers testified that when Petitioner bought the firearms, that in her mind, she did not believe that she had any other choice. After hearing the proffer, the trial judge excluded Dr. Myers'

testimony under the authority of *United States vs. Willis, supra*, finding that all of Dr. Myers' testimony was subjective and therefore not admissible in support of a duress defense.

The Petitioner submitted requested written jury instructions to the trial judge. Petitioner requested that the Court instruct the jury that the Petitioner had the burden of producing evidence to support each element of the duress defense and that if the Petitioner did so, then the government must prove beyond a reasonable doubt that the Petitioner was not under duress or coercion when she purchased the firearms. The trial judge rejected Petitioner's requested instructions and instead instructed the jury that the Petitioner had the burden to establish the defense of duress by a preponderance of the evidence. Defense counsel timely objected to the Court's charge to the jury. The jury convicted Petitioner of all nine counts alleged in the indictment. The Court sentenced Petitioner to thirty-four months in custody and three years of supervised released.

Petitioner timely gave notice of appeal to the United States Court of Appeals for the Fifth Circuit. On appeal, Petitioner complained, *inter alia,* of the trial judge's refusal to allow Dr. Myers testimony before the jury and the instruction to the jury placing the burden of proof on Petitioner on the defense of duress. The panel of the Fifth Circuit upheld the trial court's exclusion of the expert testimony pursuant to *United States vs. Willis, supra.* The panel found that the proffered expert testimony was "inherently subjective" and thus not admissible to support a defense of duress, which requires an "objective inquiry". The panel also held that the trial judge correctly instructed the jury on the burden of proof for a duress defense, citing well-established Fifth Circuit precedent. *United States vs. Willis*, 38 F.3d 170, 179 (5th Cir. 1994).

Petitioner timely filed a Petition for Rehearing *En Banc*, arguing that *United States vs. Willis* should be overruled. Petitioner argued that since *Willis* was decided there had been much research

and debate regarding domestic violence and how that issue should be addressed by courts. A result of that research and debate has been that now courts in most jurisdictions will allow expert testimony on the effects of battering in support a defense of duress, a defense of self-defense, to negate *mens rea* and to educate juries about commonly held misconceptions about the victims of battering. Petitioner cited studies and case law that support the admission of expert testimony on the issue of battering and its effects on its victims, including support of a duress defense. Petitioner urged the *en banc* Fifth Circuit to revisit the issue and overrule *United States vs. Willis*. Petitioner also pointed out in her petition for rehearing that there is a split among the circuits as to the allocation of the burden of proof on a duress defense. As the Fifth Circuit subscribes to the minority rule, which requires the defendant to prove the duress defense by a preponderance of the evidence, Petitioner asked the *en banc* Fifth Circuit to reconsider its position and instead adopt the majority rule which places the burden of proof on the government once the defense has sufficiently raised the duress defense. The Petition for Rehearing *En Banc* was denied.

REASONS FOR GRANTING THE WRIT

QUESTION PRESENTED NO. 1

WHERE A CRIMINAL DEFENDANT RAISES A DURESS DEFENSE, WHETHER THE BURDEN OF PERSUASION SHOULD BE ON THE GOVERNMENT TO PROVE BEYOND A REASONABLE DOUBT THE DEFENDANT WAS NOT UNDER DURESS, OR UPON THE DEFENDANT TO PROVE DURESS BY A PREPONDERANCE OF THE EVIDENCE.

Duress or coercion is a common law defense that has been recognized by this Court and federal circuit courts. *United States vs. Bailey*, 444 U.S. 394, 409-410, 100 S.Ct. 624, 634, 62 L.Ed.2d 575 (1980). There is not a federal statute that establishes the defense of duress. Accordingly, federal courts have developed their own definitions and jurisprudence in regard to the defense of duress or coercion. The courts that have recognized the defense of duress all seem to agree that the burden is on the defendant to produce evidence to support the defense before he entitled to a jury instruction on the issue. Courts are generally agreed that the defendant must introduce evidence on all elements of the defense before the jury can be instructed on the defense. For example, see *United States vs. Campbell*, 675 F.2d 815, 821 (6th Cir. 1982); *United States vs. Mitchell*, 725 F.2d 832, 833 (2nd Cir. 1983); *United States vs. Talbott*, 78 F.3d 1183 (7th Cir. 1996); *United States vs. Dodd*, 225 F.3d 340, 349 (3rd Cir. 2000). However, once a defendant has borne the burden of producing evidence in support of his defense, federal circuit courts have split as to who should bear the burden of persuasion.

In *United States vs. Hearst*, 563 F.2d 1331, 1336 (9th Cir. 1977), the Ninth Circuit held that once the defendant produced evidence to support the duress defense, the government was required to show that the defendant was not acting under duress when she committed the offense for which she was on trial. In explaining its holding the Ninth Circuit stated as follows:

> It is assumed that every defendant's actions were free from duress, absent evidence to the contrary. As was said in the English case of *Regina vs. Gill*, (1963) 1 W.L.R. 841, 846 (Crim. App.): "The accused, either by the cross-examination of the prosecution witnesses or by evidence called on his behalf, or by a combination of the two, must place before the court such material as makes duress a live issue fit and proper to be left to the jury. But, once he has succeeded in doing this, it is then for the Crown to destroy that evidence in such a manner as to leave in the jury's mind no reasonable doubt that the accused cannot be absolved on the grounds of the alleged compulsion." See *United States vs. Johnson*, 516 F.2d 209, 212-13 (8th Cir. 1975). See also Model Penal Code § 2.09, Comment at 8-9 (Tent. Draft No. 10, 1960); id. § 1.13(2), Comment at 110-12 (Tent. Draft No. 4, 1955).

The Eighth Circuit continues to hold that the government must prove beyond a reasonable doubt that the defendant's acts were not coerced, once the defendant introduces sufficient evidence to support the defense. *United States vs. Simpson*, 979 F.2d 1282, 1287 (8th Cir. 1992); *United States vs. Campbell*, 609 F.2d 922, 924 (8th Cir. 1979), *cert. denied*, 445 U.S. 918, 100 S.Ct. 1282, 63 L.Ed.2d 604 (1980). The Sixth Circuit followed the Eighth Circuit in *United States vs. Campbell*, 675 F.2d 815, 821 (6th Cir. 1982). The Seventh Circuit has held that absent a statute placing the burden of proof on accused, "the burden of proof remains on the government to negate beyond a reasonable doubt the affirmative defense properly raised by the defendant." *United States vs. Talbott*, 78 F.3d 1183, 1186 (7th Cir. 1996). The Second Circuit has agreed with the Eighth and Ninth Circuits that once the defense of duress is sufficiently placed in issue by the accused, "the prosecution must disprove the defense beyond a reasonable doubt." *United States vs. Mitchell*, 725 F.2d 832, 836 (2nd Cir. 1983). The Tenth Circuit has held that "[c]oercion is an affirmative defense which the government must disprove beyond a reasonable doubt only after the issue has been raised." *United States vs. Falcon*, 766 F.2d 1469, 1477 (10th Cir. 1985). The First Circuit has held that once

"a predicate warranting a duress instruction has been laid, the government is saddled with the additional burden of showing beyond a reasonable doubt that a defendant's criminal acts were not the product of duress." *United States vs. Arthurs*, 73 F.3d 444, 448 (1st Cir. 1996). Thus, the majority of circuits that have addressed the issue require the government to disprove the defense of duress or coercion once the defendant has properly raised the issue.

Although Petitioner produced sufficient evidence to warrant a jury charge on her duress defense, the jury was instructed that Petitioner had to prove each element of the duress defense by a preponderance of the evidence. In so instructing the jury, the trial judge relied on *United States vs. Willis*, 38 F.3d 170, 179 (5th Cir. 1994), which holds that for a defendant to prevail on a duress defense, she must prove each element of the defense by a preponderance of the evidence. In support of that holding, the Fifth Circuit cited *United States vs. Gant*, 691 F.2d 1159, 1165 (5th Cir. 1982) and *United States vs. Dominguez-Mestas*, 929 F.2d 1379, 1384 (9th Cir. 1991), *cert. denied*, 502 U.S. 958, 112 S.Ct. 419, 116 L.Ed.2d 440 (1991). *United States vs. Gant, supra*, does not appear to address the issue of the burden of proof for a duress defense. In *United States vs. Dominguez-Mestas, supra*, the Ninth Circuit decided that its prior decisions placing the burden of persuasion on the government did not really establish binding precedent and decided that to "require the government to prove beyond a reasonable doubt the absence of duress would create a standard that would be nearly impossible to satisfy." *Id.* at 138. The Court held that where the defense of duress does not involve refutation of any of the elements of the offense, then it is proper to place the burden of proof upon the defense by a preponderance of the evidence. *Id.*; *United States vs. Hernandez-Franco*, 189 F.3d 1151, 1158 (9th Cir. 1999). The Eleventh Circuit has cited *United States vs. Dominguez-Mestas, supra*, with approval and placed the burden of proof on the defendant to prove

the elements of a duress defense. *United States vs. Deleveaux*, 205 F.3d 1292, 1300-01 (11th Cir. 2000). The Third Circuit declined to follow the Seventh Circuit's decision in *United States vs. Talbot, supra*, and instead has followed the Eleventh Circuit by placing the burden of persuasion on the defendant for a justification defense with regard to a felon in possession of a firearms charge. *United States vs. Dodd* 225 F.3d 340, 350 (3rd Cir. 2000).

This Court should grant *certiorari* in this case to resolve the conflict between the circuits. As it now stands, similarly situated defendants will receive disparate treatment depending on the circuit in which their cases are tried. As Petitioner was tried in the Fifth Circuit she had to prove her duress defense by a preponderance of the evidence. Had Petitioner resided in and been tried in the First, Second, Sixth, Seventh, Eighth or Tenth Circuits, the government would have had to prove beyond a reasonable doubt that the defendant was not under duress when she purchased the firearms. The difference in the burdens of proof can be outcome determinative. Under the same facts a defendant may be found guilty in the Third, Fifth Ninth and Eleventh Circuits and be found not guilty in the First, Second, Sixth, Seventh, Eight and Tenth Circuits. The Fourth Circuit and the D.C. Circuit appear not to have addressed the issue.

Another reason for granting *certiorari* in this case is to establish consistency in how defenses are treated in federal courts. The position taken by the minority circuits in placing the burden of persuasion on the defendant is inconsistent with how other defenses have been treated in the federal system. Where an entrapment defense has been asserted, this Court has held that the burden of persuasion is upon the prosecution to prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by government agents. *Jacobson vs. United States*, 503 U.S. 540, 548-49, 112 S.Ct. 1535, 1540, 118 L.Ed.2d 174 (1992). "Of course,

it is a well-established proposition of federal criminal law that, when a defendant presents evidence in support of a claim of self-defense, the absence of self-defense must be proven beyond a reasonable doubt by the government. See *United States vs. Jackson*, 569 F.2d 1003, 1008 n.12 (7th Cir.) *cert. denied*, 437 U.S. 907, 98 S.Ct. 3096, 57 L.Ed.2d 1137 (1978); *United States vs. Corrigan*, 548 F.2d 879, 883 (10th Cir. 1977); *United States vs. Johnson*, 542 F.2d 230, 233 n.4 (5th Cir. 1976); *Frank vs. United States*, 42 F.2d 623, 629 (9th Cir. 1930); see also *Davis vs. United States*, 160 U.S. 469, 488, 16 S.Ct. 353, 358, 40 L.Ed. 499 (1895) (burden of proof on government with respect to defendant's sanity)." *United States vs. Alvarez*, 755 F.2d 830, 842-43 (11th Cir. 1985), *cert. denied*, *Hernandez vs. United States*, 474 U.S. 905, 106 S.Ct. 274, 88 L.Ed.2d 235 (1985), and *Portal vs. United States*, 482 U.S. 908, 107 S.Ct. 2489, 96 L.Ed.2d 380 (1987). See also 2A Fed. Jury Prac. & Instr. § 45.19, 5th Edition. A difference in how self-defense and duress claims are treated would be unfair because each defense excuses what would otherwise be unlawful conduct due to a reasonable fear of death or serious bodily injury.

The Petitioner respectfully requests that this Court grant her Petition for Writ of *Certiorari* in order to resolve the split in authority among the federal courts of appeal as to the burden of persuasion for a duress defense and to establish consistency within the federal system as to who bears the burden of persuasion on affirmative defenses.

QUESTION PRESENTED NO. 2

WHETHER PETITIONER WAS DEPRIVED OF A FAIR TRIAL BY THE EXCLUSION OF EXPERT TESTIMONY ON BATTERING AND ITS EFFECTS THAT WAS OFFERED IN SUPPORT OF HER DEFENSE OF DURESS.

The trial judge did not allow the Defendant's expert to testify before the jury on the issue of battering and its effects on its victim. The trial judge relied on the leading Fifth Circuit case on the issue, *United States vs. Willis*, 38 F.3d 170 (5th Cir. 1994). The court in *United States vs. Willis* relied on *United States vs. Johnson*, 956 F.2d 894 (9th Cir. 1992), *supplemented on denial of reh'g sub nom. United States vs. Emelio*, 969 F.2d 849 (9th Cir. 1992). The *Willis* court held that expert testimony on the issue of "battered woman's syndrome" was not admissible to support a defense of duress because evidence that a defendant is suffering from battered woman's syndrome is inherently subjective, and is therefore irrelevant to the objective issue of whether the accused was under duress when the offense was committed. *United States vs. Willis, supra* at 176-77.

United States vs. Willis also purported to rely on the Second Circuit's decision in *United States vs. Smith*, 987 F.2d 888 (2nd Cir. 1993), *cert. denied*, 510 U.S. 875, 114 S.Ct. 209, 126 L.Ed.2d 165 (1993). The *Willis* court construed *Smith* to hold that because duress requires an objective showing that expert testimony on battered woman's syndrome would be irrelevant to that defense. *United States vs. Willis, supra* at 176. It appears that the *Willis* court misconstrued the holding of *United States vs. Smith*, and that there is actually a conflict between the two decisions. The *Smith* court did agree that although "duress requires an objective showing, we believe Smith's request for a psychiatrist should have been granted." *United States vs. Smith, supra* at 890. The court in *Smith* went on to say that it did not agree with the trial judge's "denial of Smith's request for a psychiatrist on the ground that testimony as to Smith's unusual susceptibility to coercion was

irrelevant and admissible. A psychiatrist might have testified to other issues at trial and sentencing, including that Smith's behavior was not inconsistent with his being under duress. An expert might have explained that Smith's extreme fear caused him to act aggressively and angrily in the bank and to resist arrest. Fear may also have prevented him from using a loaded gun against Hammerstone [his antognist]. Explaining this behavior might have bolstered the credibility of his duress claim, which was relevant to the jury's determination." *United States vs. Smith, supra* at 891. It is apparent that the Second Circuit believed that expert testimony was relevant and could be helpful to a jury in evaluating a claim of duress. Thus, *United States vs. Smith* seems at odds with *United States vs. Willis* and the Fifth Circuit's decision in Petitioner's case.

United States vs. Willis also in conflict with the Tenth's Circuit's decision in *Dunn vs. Roberts*, 963 F.2d 308 (10th Cir. 1992). The issue in *Dunn* was whether the defendant had the specific intent to aid and abet a narcotics transaction, which the *Willis* court found to be a different issue than whether the defendant in *Willis* committed a similar crime under duress. The Fifth Circuit focused on the differences in the two cases as opposed to the substantial similarities. The Tenth Circuit stated the following regarding the use of expert testimony where there was evidence of battering of the accused:

> The mystery in this case, as in all battered woman cases, is why petitioner remained with Daniel Remeta despite repeated abuse. An expert could have explained to the jury the nature of battered woman's syndrome and given an opinion whether petitioner suffered from the syndrome. This is an area where expert opinion is particularly useful and oftentimes necessary to interpret for the jury a situation beyond average experience and common understanding. The effect of the expert testimony would be to explain why a defendant suffering from the battered woman's syndrome would not leave her batterer. As the Kansas Supreme Court stated: "Expert testimony on the battered woman's syndrome would help dispel the

> ordinary lay person's perception that a woman in a battering relationship is free to leave at any time. The expert evidence would counter any 'common sense' conclusions by the jury that if the beatings were really that bad the woman would have left her [batterer] much earlier." *State vs. Hodges*, 239 Kan. 63, 716 P.2d 563, 570 (1986), *overruled on other grounds*, *State vs. Stewart*, 243 Kan. 639, 763 P.2d 572, 579 (1988). Such evidence is introduce to help the jury understand why a battered woman is psychologically unable to leave the battering relationship and why she lives in high anxiety of fear of the batterer. See *Hodges*, 716 P.2d at 570. Thus, such evidence would have provided an alternative reason for petitioner's continued presence with Daniel Remeta. We agree with the district court that the evidence should have been "considered by the jury in evaluating whether petitioner had the requisite intent to participate in the crimes of which she was charged." *Dunn vs. Roberts*, 768 F.Supp. 1442, 1448 (D. Kan. 1991).

Dunn vs. Roberts, 963 F.2d 308, 313-14, (10th Cir. 1992). The Tenth Circuit held that by refusing Dunn funds for expert assistance, the state trial court effectively prohibited her from presenting relevant information to the jury, albeit on an essential element of the crime, and held that "petitioner was deprived of the fair trial due process demands." *Id.* Again, the issues in *Dunn vs. Roberts*, as in Petitioner's case, are more alike than they are different. In Petitioner's case, Dr. Myers would have testified about why Petitioner remained with her batterers, explained the effects of battering on its victim, given an opinion that Petitioner was the victim of a power and control relationship, would have interpreted for the jury a situation beyond their experience and understanding and would have helped dispel the ordinary lay person's perception that a woman in a battering relationship is free to leave at any time. Thus, the decision below in Petitioner's case also conflicts with the Tenth Circuit's decision in *Dunn vs. Roberts*.

In the last twenty years, there has been much research and debate regarding domestic violence and how that issue should be addressed by courts. The result is that now courts in most jurisdictions

will allow expert testimony on the effects of battering in support of a variety of issues, including a defense of duress, a defense of self-defense, to negate *mens rea* and to educate juries about commonly held misconceptions about the victims of battering. The Supreme Court of New Jersey has held that in a duress case expert testimony is admissible for the purpose of assisting the jury to understand why a defendant would not leave her batterer; was relevant and admissible to assist the jury in its assessment of a defendant's recklessness; was relevant and admissible for the purpose of assisting the jury to understand the defendant's state of mind; but was not admissible to assist the jury in evaluating whether a person of reasonable firmness would engage in the same criminal conduct towards a third person that the defendant committed if they were faced with the same threats of harm as the defendant faced. *State vs. B.H.*, 870 A.2d 273, 291-92 (N.J. 2005). In the state of Washington, expert testimony is admitted "to show how severe, on-going abuse can affect the defendant's perceptions and reactions in ways that may not be apparent to the average juror. See *State vs. Riker*, 123 Wash.2d 351, 359, 869 P.2d 43 (1994). Such evidence is introduced to explain not only the defendant's subjective mental state, but also the reasonableness of the defendant's actions. *Id.*" *State vs. Williams*, 937 P.2d 1052, 1058 (Wash. 1997). In the state of Rhode Island, expert testimony has been admitted in a post conviction proceeding to show how battering had affected a defendant and coerced her into making admissions which contributed to her wrongful conviction. The Supreme Court of Rhode Island found that such evidence could have changed the verdict and granted post conviction relief. *McMaugh vs. State*, 612 A.2d 725, 732-34 (R.I. 1992). The decision below in Petitioner's case is in conflict with decisions from each of the foregoing state Supreme Courts.

As the result of the *Violence Against Women Act, Title IV of the Violent Crime Control and*

Law Enforcement Act of 1994 (Public Law 103-322), the National Institute of Justice carried out an extensive research and evaluation program to develop knowledge about effective responses to violence against women. One result of that research was a report entitled *THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS, Report Responding to Section 40507 of the Violence Against Women Act,* produced by the United States Department of Justice and the United States Department of Health and Human Services in May, 1996 (hereinafter "the Report").[1] The Report consists of three separate papers that address three key issues specified in the legislation. The first paper concluded that scientific research and clinical knowledge supports the validity and relevance of battering as a factor in the reactions and behavior of victims of domestic violence, that such knowledge is relevant at many points in the criminal justice process and that expert testimony can provide information that helps fact-finders interpret behavior of the battered woman. *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials, Overview and Highlights of the Report,* p. iv. The second paper concludes that while much variation exists, expert testimony on battering and its effects has been found admissible in each of the fifty states plus the District of Columbia. *Trend Analysis: Expert Testimony on Battering and its Effect in Criminal Cases.* The third paper found that "expert testimony is most likely to clarify the evidence when it is drawn from the now extensive body of scientific and clinical knowledge and when the relationship between the content of the testimony and the other evidence or issues in the case is made is explicit." *The Validity and Use of Evidence Concerning Battering and its Effects on Criminal Trials, Overview and Highlights of the Report*, p.

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[1]This report can be found at www.ncjrs.org and at the United States Department of Justice website, at www.usdoj.gov (click on Resources, then Publications).

vii. The government's position throughout this case, and the Court of Appeals' decision in Petitioner's case, conflict with the conclusions of the Justice Department's report.

"In state courts, where the law of self-defense is essentially the same as in federal court in terms of requiring a showing of reasonable conduct by the defendant, there is almost unanimous agreement that defendants may present expert testimony regarding battered woman's syndrome as part of their defense. See generally 18 A.L.R. 4th 1153 (1982 & Supp. 1994)." *United States vs. Marenghi*, 893 F.Supp. 85, 95 (D.Maine 1995). For example, see *People vs. Humphrey*, 13 Cal. 4th 1073, 1082, 921 P.2d 1, 6 (Cal. 1996) (Evidence Code § 1107 allows expert testimony on "battered woman's syndrome"); *Bonner vs. State*, 740 So.2d 439 (Ala. Crim. App. 1998); *Bechtel vs. State*, 840 P.2d 1, 10 (Okla. Crim. App. 1992); § 2901.06, Ohio Revised Code Ann.; *State vs. Sallie*, 81 Ohio St.3d 673, 693 N.E.2d (1998), *reconsideration denied*, 82 Ohio St.3d 1444, 695 N.E.2d 266. See also Barnes, "Admissibility of Expert Testimony Concerning Domestic Violence Syndrome to Assist Jury in Evaluating Victim's Testimony or Behavior", 57 ALR 315, and *Burke*, "Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman", North Carolina Law Review, Dec. 2002, p. 225.

"Because duress and self-defense share the same elements of reasonableness, imminence, and the need for self-protection, one would expect the battered woman's syndrome theory to be as relevant to one defense as to the other." *Id.* at 254. The issue should not be whether the expert testimony is being offered in a self-defense case or a duress case, but rather is the expert testimony helpful to the jury to explain the conduct of the accused. Expert testimony on battering and its effects has been commonly employed to explain conduct that appears counter-intuitive and that is misunderstood by those who are not familiar with dynamics of domestic violence. Such testimony

answers common questions such as why did she not leave, why did she not ask for help, why did she not call the police, why did she continue to put up with the battering or why did she obey his commands. These issues arise in any case that involves a victim of domestic violence, whether it is a self-defense case, a duress case, or whether the victim is a witness for the prosecution. *United States vs. Marenghi*, 893 F. Supp. 85, 96 (D. Maine 1995); *People vs. Romero*, 13 Cal.Rptr.2d 332, 338 (Cal. Ct. App. 1992); *rev'd on other grounds*, 8 Cal. 4th 728, 35 Cal.Rptr.2d 270, 883 P.2d 388 (1994).

The prosecution has also made use of expert testimony to explain the conduct or the testimony of a state's witness that is the victim of domestic abuse. Such expert testimony has been admitted in courts throughout the country when offered by the prosecution to explain seemingly inconsistent conduct or testimony of a state's witness. The leading federal case where expert testimony on "battered woman's syndrome" was admitted on behalf of the prosecution is *Arcoren vs. United States*, 929 F.2d 1235 (8th Cir. 1991), *reh'g denied, cert. denied*, 502 U.S. 913, 112 S.Ct. 312, 116 L.Ed.2d 255 (1991). In that case, the court upheld the admission of expert testimony on "battered woman's syndrome" to impeach an abuse victim's recantation at the criminal trial of the abuser. The court determined that some explanation of the victim's changed statements would aid the jury in deciding which statements were credible. In state courts it is common to admit "battered woman's syndrome" evidence to provide an explanation for a victim's inconsistent statements. For example, see *State vs. Borrelli*, 629 A.2d 1105 (Conn. 1993); *State vs. Grecinger*, 569 N.W.2d 189 (Minn. 1997); *People vs. Jasper*, 119 Cal.Rptr.2d 470 (App. 5th Dist. 2002); *People vs. Lafferty*, 9 P.3d 1132 (Colo. Ct. App. 1999); *State vs. Weaver*, 648 N.W.2d 355 (S.D. 2002); *Bonner vs. State*, 740 S.2d 439 (Ala. Crim. App. 1998); *Alvarado vs. State*, 572 S.E.2d 18 (Ga. Ct. App. 2002); *State*

vs. Grubbs, 577 S.E.2d 493 (S.C. Ct. App. 2003). If the prosecution can use expert testimony on the effects of battering to bolster the credibility of a witness, then a defendant should be able to use such evidence to bolster the credibility of her claim of duress.

Expert testimony about battering and its effects has been admitted to explain a variety of behaviors. In *Bonner vs. State*, 740 So.2d 439 (Ala. Crim. App. 1998), expert testimony concerning "battered woman's syndrome" was admitted for the purpose of showing coping mechanisms of battered women and why they do not leave abusive homes even when they are subject to repeated physical violence. Expert testimony concerning "battered woman's syndrome" has been admitted to explain why victims of domestic violence may stay in a battering relationship and may not be as forthcoming as the public might expect in divulging such information and that there is often only a brief window shortly after an incident in which victims will tell the truth. *People vs. Williams*, 93 Cal.Rptr.2d 356 (2nd Dist. 2000). Expert testimony on "battered woman's syndrome" has been admitted for the purpose of dispelling many of the commonly held misconceptions about battered women and to prove the defendant honestly believed she needed to defend herself against imminent death or great bodily injury and to show the reasonableness of her belief. *People vs. Jasper*, 119 Cal.Rptr.2d 470 (App. 5th Dist. 2002). Expert testimony on "battered woman's syndrome" has been admitted to explain why and how, in light of a pattern of abuse, the defendant could honestly and reasonably perceive an imminent threat of immediate danger. *State vs. Smullen*, 844 A.2d 429 (Md. 2004). Expert testimony on "battered woman's syndrome" has been admitted to explain the behavior of a battered spouse. *Ryan vs. State*, 988 P.2d 46 (Wyo. 1999). In *State vs. Yusuf*, 800 A.2d 590 (Conn. App. 2002), expert testimony regarding "battered woman's syndrome" was found to be relevant to assist the jury in determining whether the victim's conduct was consistent with the pattern

and profile of a battered woman. It has been held that expert testimony on "battered woman's syndrome" is useful to refute common misconceptions concerning evidence of prior abuse and the reaction of battered women. *State vs. Tierney*, 813 A.2d 560 (N.J. App. 2003). A domestic violence expert's testimony regarding battered person's syndrome was admissible to explain the behavior of the defendant's girlfriend in failing to report abuse for three months. *Alvarado vs. State*, 572 S.E.2d 18 (Ga. Ct. App. 2002). In *Harrington vs. State*, 858 So.2d 278 (Ala. Crim. App. 2002), *cert. den.*, 858 So.2d 305 (Ala. 2003), it was held that a trial court abused its discretion in a murder prosecution by precluding defense experts from expressing their opinions that the defendant was an abused woman, that the victim was a batterer, and that the defendant suffered from battered spouse syndrome. The court held that such testimony would not have been on the ultimate issue as the question the jury had to decide was the defendant's intent when she fired the weapon and the reasonableness of her belief that she needed to defend herself.

Whether the testimony is being offered on behalf of the defense or the prosecution, whether it relates to a defense of self-defense or duress, or whether the charge was murder, assault or sexual assault, whenever one of the parties is alleged to be the victim of battering, expert testimony on the effect of battering on its victims is relevant to explain the conduct of the battered person. Courts seem to be in near unanimous agreement that the phenomenon of battering is so outside the experience of the typical juror that expert testimony is not only helpful, but often necessary to explain the complex and often perplexing conduct of the victim. Almost all of the issues upon which expert testimony was admitted in the above referenced cases were present in Petitioner's case and would have been addressed by Dr. Myers if she had been allowed to testify before the jury. Her testimony was admissible expert opinion as allowed by Rule 702, Fed. R. Evid., and was relevant

under Rule 402, Fed. R. Evid. The exclusion of Dr. Myers' testimony violated Petitioner's Fifth Amendment Due Process and Sixth Amendment rights to present witnesses on her behalf, depriving her of a fair trial and affecting her substantial rights. Rule 52(a), Fed. R. Crim. Pro.

The Court of Appeals' decision in Petitioner's case conflicts with the decisions of other courts of appeals as set forth above, as well as decisions of the highest state courts and many intermediate state appellate courts. The Court of Appeals' decision is also in conflict with prevailing scientific knowledge and theory on battering and its effects on its victims. Petitioner's petition should be granted in order to resolve the conflicts between federal circuit courts, between federal decisions and state court decisions and so that federal court decisions will reflect the most current scientific thought and knowledge. We, as a society, have recognized that domestic violence is a serious problem. Recognition of that problem by the highest court in the land and clear resolution of significant legal issues by this court will be a great interest and benefit to the public.

A. Opinion of 5th Circuit Court of Appeals in *United States vs. Dixon*

United States Court of Appeals
Fifth Circuit
FILED
June 20, 2005
Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 04-10250

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

KESHIA CHERIE ASHFORD DIXON,

Defendant - Appellant.

Appeal from the United States District Court
for the Northern District of Texas

Before REAVLEY, JOLLY, and PRADO, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This case may have added interest because the defendant introduced evidence concerning battered woman's syndrome as part of her duress defense. Otherwise, this appeal is unremarkable. The appellant, Keshia Cherie Ashford Dixon, was convicted of one count of receiving a firearm while under indictment and eight counts of making a false statement to purchase a firearm.[1] In appealing the conviction, she contends that the district court erred in: (1) refusing to permit expert testimony in support of her defense of duress; (2) excluding as hearsay an out-of-court statement made by her former boyfriend to an ATF agent; and (3) instructing the jury

[1] See 18 U.S.C. §§ 922(n) and 922(a)(6).

that she bore the burden of proving her defense of duress by a preponderance of the evidence. We find no reversible error, and thus AFFIRM.

I

Two Dallas gun shows are the situs of the crime. The relevant facts, occurring in January 2003, are largely undisputed. At both of the gun shows, Dixon purchased multiple firearms by providing false information to dealers. In particular, she provided an incorrect address and stated that she was not under indictment for a felony, when in fact she had been indicted for her role in a check cashing scheme. In each instance, the dealer ran Dixon's information through the National Instant Criminal Background Check System, received a "proceed" response, and sold Dixon the gun.

At trial, Dixon attempted to raise a defense of duress, claiming that she had been coerced into purchasing the guns by her boyfriend, Thomas Earl Wright, and an associate, Hookie Sanders. Both Wright and Sanders were convicted felons, so neither could purchase the guns directly. Each of the gun dealers testified that Dixon was accompanied by several men while at the gun shows, but that they did not seem to be controlling her purchases.

Dixon testified that she had been abused by Wright, who allegedly beat her on a regular basis and threatened her children. Her description of the relationship was largely corroborated by the testimony of her two daughters. Dixon further testified that she

was afraid that, if she did not buy the guns for Wright, he would harm or even kill her or her daughters.

In support of her duress defense, Dixon attempted to introduce the testimony of Dr. Toby Myers, a domestic violence expert, regarding the reactions of battered women to their abusers. The court held that Dr. Myers's testimony addressed Dixon's subjective state of mind and was therefore inadmissible to show duress. Dixon also attempted to introduce the testimony of Kelly Oates, an agent with the Bureau of Alcohol, Tobacco and Firearms, concerning an out-of-court statement by Wright that he gave Dixon $115 to purchase a gun for him. The district court excluded Oates's testimony as inadmissible hearsay.

The jury convicted Dixon on all nine counts.

II

On appeal, Dixon contends that the district court erred in three respects: (1) in refusing to admit Dr. Myers's expert testimony; (2) in excluding Wright's out-of-court statement as inadmissible hearsay; and (3) in giving a jury instruction that placed the burden of proving duress by a preponderance upon the defendant.

A

We first consider whether the district court erred in excluding Dr. Myers's testimony concerning the psychological effects of Wright's battery of Dixon. We review a district court's

> 3. that [she] had no reasonable legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm; and
>
> 4. that a direct causal relationship may be reasonably anticipated between the criminal action taken and the avoidance of the threatened harm.

United States v. Willis, 38 F.3d 170, 175 (5th Cir. 1994); (quoting United States v. Liu, 960 F.2d 449, 453 (5th Cir. 1992)). Whether apprehension is "well-grounded" turns on whether "a person of reasonable firmness in [the defendant's] situation would have been unable to resist" the threat. Id. (quoting AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 2.09(1) (1985)). In short, the duress defense requires an objective inquiry into whether a defendant's conduct, although illegal, represented her only reasonable alternative to serious bodily injury or death.

1

Most of the expert testimony proffered in this case, like that in Willis, dealt with the defendant's subjective vulnerability to coercion. In Willis, we held that expert testimony that a defendant "suffers from the battered woman's syndrome" is "inherently subjective" and therefore inadmissible to support a defense of duress. Id. at 175, 177. In the case at bar, although Myers carefully avoided using the term "battered woman's syndrome", she nonetheless explained that Dixon was "more vulnerable because she had lost her job" and that Dixon "didn't think [calling the

police] would do any good". Dr. Myers concluded that, as a result of Wright's threats and repeated battery, Dixon believed "in her heart and mind [that] she didn't have a choice" as to whether to buy the guns. In short, this testimony clearly focuses on Dr. Myers's opinions as to Dixon's individual state of mind.

To the extent that Dr. Myers's proffered testimony described Dixon's subjective perceptions of danger, it was not relevant to the inquiry at hand -- that is, to whether such perceptions were "well-grounded" or objectively reasonable under the circumstances. As such, it could not have "assist[ed] the trier of fact" in making any determination of material fact. See FED. R. EVID. 702. Thus, we hold that the district court did not err in excluding this portion of Dr. Myers's testimony.[2]

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[2] Furthermore, Dr. Myers's assertion that Dixon's fears were reasonable does not redeem her testimony. Whether a defendant's apprehension of harm is reasonable under the circumstances is ultimately a question for the jury. Although it is certainly possible that expert testimony might shed light on the reasonableness of a given type of conduct by describing typical reactions to unusual circumstances, such was not the case here. Instead, at the prompting of counsel, Dr. Myers offered the wholly conclusory assertions (1) that Dixon's fear of Wright was "well grounded" and (2) that her decision not to leave Wright was not "reckless or negligent".

These statements represent a transparent strategy to distinguish Dr. Myers's testimony from that which was excluded in Willis by inserting brief, perfunctory "objective" characterizations into testimony that otherwise focuses exclusively on the defendant's subjective perceptions. If the rule announced in Willis -- i.e., that expert testimony as to a defendant's subjective beliefs is inadmissible to show duress -- were so easily swept aside, it would be meaningless.

Our analysis does not end here, however. Dixon contends that Dr. Myers's proffer did not focus exclusively on subjective perceptions. Rather, Dixon argues, the proffer included a significant amount of "'objective' testimony that would show that [Dixon's] fear ... was well-grounded in her history and experience with Wright". Although it is not altogether clear to us what Dixon means by "objective testimony", the record suggests that the term refers to testimony by Dr. Myers as to the facts of Dixon's relationship with Wright.[3]

Such testimony, Dixon contends, would be based upon, inter alia, "interviews with Dixon's mother and daughters, statements from Wright and Sanders to the government" and "the testimony of ... Jocelyn Dixon". In short, it would be inadmissible hearsay. See FED R. EVID. 802-804. Dixon points out that the facts upon which an expert opinion are based "need not be admissible in evidence in order for the opinion or inference to be admitted". FED. R. EVID.

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[3] Another type of expert testimony that may be termed "objective" is that which describes the typical patterns, circumstances and effects of battery within an abusive relationship without attempting to draw any conclusions therefrom as to the subjective perceptions of a particular defendant. Since Willis was decided, various courts have recognized a distinction between such generalized testimony and "subjective" expert testimony that effectively diagnoses a particular defendant as suffering from battered woman's syndrome. See, e.g., State v. Grecinger, 569 N.W.2d 189, 196-97 (Minn. 1997); Scugoza v. State, 949 S.W.2d 360, 363 (Tex. App. San Antonio 1997); State v. Stringer, 879 P.2d 1063, 1069 (Mont. 1995).

703; see also United States v. Williams, 447 F.2d 1285, 1290 (5th Cir. 1971)(en banc). The inverse of this statement, however, is not true. Where, as here, an expert's opinion testimony is inadmissible, the hearsay upon which that opinion is based is also inadmissible. Were it otherwise, designation as an "expert" would permit any such witness -- regardless of her qualification or the relevance of her testimony -- to escape the ambit of the hearsay rules.

Thus, in view of the inadmissibility of Dr. Myers's opinion testimony, she is not a competent witness to testify as to facts of Dixon's relationship with Wright based solely on what others told her. We therefore hold that the district court did not abuse its discretion in excluding such testimony.

B

Dixon next argues that the district court erred in excluding, as inadmissible hearsay, potentially inculpatory statements made by Wright to Agent Oates. Shortly after his arrest, Wright told Oates that he and an associate had given Dixon $115 to purchase a .380 semiautomatic pistol for them, and had done so because they were convicted felons and could not buy the guns themselves. Dixon acknowledges that Oates's testimony concerning the statement is hearsay, but contends that it is nonetheless admissible as a statement against interest. See FED. R. EVID. 804(b)(3).

The hearsay exception for statements against interest applies only where (1) the declarant is unavailable; (2) the statement tends to subject the defendant to criminal liability, such that a reasonable person in his position would not have made the statement unless he believed it to be true; and (3) the statement is corroborated by circumstances clearly indicating its trustworthiness. See United States v. Sarmiento-Perez, 633 F.2d 1092, 1101 (5th Cir. 1981). The district court assumed that Wright would refuse to testify, given the potentially incriminating nature of his statement. As such, the admissibility of Oates's hearsay testimony turned exclusively on whether Wright's admission was corroborated by circumstances indicating its trustworthiness.

We will uphold a determination as to the trustworthiness of an out-of-court statement "unless it is clearly erroneous". United States v. Vega, 221 F.3d 789, 803-04 (5th Cir. 2000). In this case, the district court based its decision to exclude Oates's testimony, in part, on a major inconsistency between Wright's account of events and Dixon's. Although Wright admitted in his statement to Oates that he gave Dixon money to purchase a gun for him, he also asserted that he went to the gun shows "at Dixon's request" to "show her which ones to purchase because she didn't know anything about guns". This directly contradicts Dixon's account, in which Wright and Sanders physically coerced her into going to the gun show with them.

The discrepancy between the two accounts goes to the very heart of the duress defense -- that is, whether Dixon bought the guns under threat of violence. Thus, while Dixon contended that she acted under duress, she sought to introduce a statement that indicated she acted willingly and voluntarily. Faced with such a fundamental inconsistency, the district court did not err in excluding the statement.

C

Finally, Dixon contends that the district court erred in instructing the jury that she, as the defendant, bore the burden of proving her duress defense by a preponderance of evidence. Our circuit's law is clear on this point: "Since a justification defense is an affirmative defense, the burden of proof is on the defendant. To succeed, the defendant must prove each element of the defense by a preponderance of the evidence." Willis, 38 F.3d at 179. As such, Dixon's contention is meritless.

III

For the foregoing reasons, the conviction is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 04-10250

U.S. COURT OF APPEALS
FILED
JUL 20 2005
CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

KESHIA CHERIE ASHFORD DIXON

Defendant - Appellant

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING EN BANC

(Opinion 6/20/05, 5 Cir., _____, _____ F.3d _____)

Before REAVLEY, JOLLY, and PRADO, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

REHG-6a

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.